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 GI Plum Holdco, LLC; and Quince Holdings  
 LLC dba Pueblo Springs Rehabilitation Center

UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF CALIFORNIA

PLUM HEALTHCARE GROUP, LLC,  
 etc., et al.,

Plaintiffs,

v.

ONE BEACON PROFESSIONAL  
 INSURANCE, etc., et al.,

Defendants.

CASE NO. 15CV2747W MDD  
 PLAINTIFFS' RESPONSE TO  
 DEFENDANTS' SEPARATE  
 STATEMENT OF UNDISPUTED  
 FACTS IN SUPPORT OF ITS  
 MOTION FOR SUMMARY  
 JUDGMENT OR PARTIAL  
 SUMMARY JUDGMENT;  
 PLAINTIFFS' STATEMENT OF  
 DISPUTED AND UNDISPUTED  
 FACTS

(Memorandum of Points and  
 Authorities; Objections To and  
 Motion To Strike Evidence;  
 Declaration of Richard A. Huver;  
 Declaration William Wilson;  
 submitted concurrently.)

Date: April 24, 2017

Judge Thomas J. Whelan

**[NO ORAL ARGUMENT  
 PURSUANT TO LOCAL RULE]**

Pursuant to Local Rule 7.1(f), plaintiffs respond to defendants OneBeacon Professional Insurance and Homeland Insurance Company of New York's statement of undisputed material facts in support of their motion for summary judgment or partial summary judgment.

**UNDISPUTED FACTS AND EVIDENCE IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

**Moving Party's Undisputed Material Fact and Supporting Evidence:**

**Plaintiff's Response and Supporting Evidence:**

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| <p>1. Homeland Insurance Company of New York ("Homeland") issued a liability insurance policy to Plaintiffs with an inception date of August 4, 2014 (the "Policy").</p>   | <p>1. Undisputed.</p>  |
| <p>2. The Insuring Agreement of the Policy's "Claims Made General Liability Insurance" section states in pertinent part:</p> <p>"The Underwriter will pay up to the applicable Limit of Liability shown in ITEM 4.B. of the Declaration on behalf of the Insured any Loss which the Insured is legally obligated to pay as a result of a covered Claim . . . that is caused by an Occurrence happening on or after the Retroactive Date; provided, that the Claim is first made against the Insured during the Policy Period or applicable Extended Reporting Period and reported to the Underwriter in accordance with GENERAL CONDITION (C) of this Policy."</p> | <p>2. Plaintiffs do not dispute that The Policy is a "Claims Made" and "Claim Reported" policy containing these terms.</p> |
| <p>3. The Policy contained a deductible of \$250,000 per claim.</p>  | <p>3. Undisputed.</p>  |
| <p>4. The Policy's General Conditions section regarding</p>  | <p>4. Plaintiffs do not dispute the fact that Defendants did not have to pay any combination</p>                           |

1 “Limits of Liability” stated in  
2 pertinent part:

3 “The **Insured** shall be  
4 responsible for payment in full  
5 of the applicable deductible or  
6 self-insured retention stated in  
7 ITEM 4 of the Declarations, and  
8 the Underwriter’s obligation to  
9 pay **Loss** or **Defense Expenses**  
10 under this Policy shall be excess  
11 of such deductible or self-  
12 insured retention; . . . .”

of Loss/Defense expense until  
\$250,000 of deductible was  
incurred. Plaintiffs dispute  
any argument that a legal  
defense was not required until  
then as the Policy requires  
defendants to immediately  
undertake the defense upon  
tender of the claim. See  
Defendants’ Exhibit (Defs’  
Ex.) 1, pg. 67, paragraphs (D)  
and (F).

8 5. Each of the Plaintiffs was a  
9 named insured.

5. Undisputed.

10 6. The Policy defined “insured” to  
11 include “any **Employee** or  
12 **Volunteer**, but only when such  
13 **Employee** or **Volunteer** is  
14 acting within the capacity and  
15 scope of his or her duties as  
16 such.”

6. Undisputed that for purposes  
of this liability coverage, an  
employee is only considered  
to be an “Insured” and entitled  
to liability coverage if they are  
(1) a defendant and (2) they  
were acting in the capacity and  
scope of their duties when  
they caused injury to someone  
else. However, Ms. Harris  
was not a defendant, so this  
portion of The Policy is really  
irrelevant. More importantly,  
Ms. Harris was not an  
“Insured.”

See Defs’ Ex. 1, pgs. 46 and  
48.

19 7. The Policy further provides that  
20 “an **Employee’s** status as an  
21 **Insured** is determined as of the  
22 date of the **Occurrence** or  
23 **Wrongful Act** upon which a  
24 **Claim** involving the **Employee**  
25 is based.”

7. Undisputed that for purposes  
of liability coverage, an  
employee is only considered to  
be an “Insured” and entitled to  
liability coverage if they are  
(1) a defendant and (2) they  
were acting in the capacity and  
scope of their duties when  
they caused injury to someone  
else. However, disputed that  
this policy provision is  
intended to define the hour at  
which an injury occurs for  
purposes of determining  
whether Harris was in the  
course and scope of her

employment when she was injured. Ms. Harris was never a defendant so she could not be an "Insured" under the liability coverage.

8. The Policy contained three exclusions that read:

Except as otherwise expressly provided in this Policy, this Policy does not apply to, and the Underwriter will not pay any **Loss or Defense Expenses**, for any **Claim** based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any actual or alleged:

\* \* \*

(2) act, error, omission, **Occurrence, Wrongful Act**, event, suit or demand which was the subject of any notice given under any other policy of insurance or plan or program of self-insurance in effect prior to the Inception Date as set forth in ITEM 2 of the Declarations; . . .  
(5) obligation of an **Insured** pursuant to any workers' compensation, unemployment compensation, disability benefits or similar law; . . .  
(7) **Claim** made by or for the benefit of, or in the name or right of, one current or former **Insured** against another current or former **Insured**; ...

9. In October 2014, Janice Harris sued Plaintiffs for an injury she suffered on October 22, 2013 (the "Accident").

10. In her complaint, Harris alleged she was an Arizona resident and the Director of Nursing for plaintiff Quince Holdings, LLC, one of the nursing homes in the Plum Healthcare network.

8. Undisputed the Policy read as quoted. Disputed that defendants ever asserted Exclusion (D)(2) or (D)(5) before this motion for summary judgment. Disputed that any of the three quoted Exclusions applied to this claim.

Declaration of Richard A. Huver ("Huver Dec., ¶16, and Exhibit 1, Deposition of Daniele Freaner ("Ex. 1, Freaner Dep") at 55:17 - 56:18; 58:24 - 59:12; 137:15 - 138:11; Huver Dec., ¶17 and Exhibit 2, Deposition of Maureen Ringland ("Ex. 2, Ringland Dep"), at 142:24 - 143:7; 144:1-21.

9. Undisputed.

10. Undisputed.

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| <p>1 11. In her complaint, Harris alleged<br/> 2 that she had traveled to Bishop,<br/> 3 California to attend a “budget<br/> 4 retreat” organized by her<br/> 5 employer Quince and the other<br/> 6 Plaintiffs and attended by other<br/> 7 senior staff from facilities in the<br/> 8 Plum HealthCare network.</p> | <p>11. Disputed. The budget retreat<br/> was scheduled for a resort in<br/> June Lake, CA. The stop in<br/> Bishop was not for budget<br/> retreat purposes.</p> <p>Defs’ Ex. 3, pg. 114, ¶15.<br/> Huver Dec., ¶20 and Ex.5, pg.<br/> 172.</p>   |
| <p>6 12. In her complaint, Harris alleged<br/> 7 that during the budget retreat,<br/> 8 Plaintiffs organized an off-road<br/> 9 vehicle activity as a surprise<br/> 10 addition to the “agenda” for the<br/> 11 retreat.</p>   | <p>12. Disputed. Ms. Harris’s<br/> complaint alleged the<br/> recreational Rhino ATV ride<br/> occurred during free-time, was<br/> not listed on the approved<br/> agenda, and was not part of<br/> the budget planning.</p> <p>Defs’ Ex. 3, pg. 114, ¶16, and<br/> pg. 115, ¶17. Huver Dec., ¶18<br/> and Exhibit 4, Deposition of<br/> John Romero (“Ex. 4 Romero<br/> Dep”) at 56:23 - 57:12. Huver<br/> Dec., ¶20 and Ex. 5, pg. 172.</p> |
| <p>14 13. In her complaint, Harris alleged<br/> 15 that, while riding in a RHINO<br/> 16 off-road vehicle driven by<br/> 17 fellow employee Christopher<br/> 18 Romney, the vehicle rolled over<br/> 19 and Harris was seriously<br/> 20 injured.</p>  | <p>13. Undisputed except for any<br/> inference that Harris was an<br/> employee within the course<br/> and scope of her employment<br/> at the time she was injured.<br/> Harris specifically alleged she<br/> was not in the course and<br/> scope of her job duties when<br/> she was injured.</p> <p>Defs’ Ex. 3, pg. 116, ¶22.</p>   |
| <p>21 14. In her complaint, Harris alleged<br/> 22 that, Plaintiffs negligently<br/> 23 “organized, planned, and carried<br/> 24 out” the off-road vehicle<br/> activity, and failed to adequately<br/> train or warn Romney how to<br/> operate the RHINO safely.</p>   | <p>14. Undisputed that Harris alleged<br/> that all defendants acted<br/> negligently, which included<br/> the Rhino owner who had no<br/> relationship with the Plum<br/> entities.</p>  |
| <p>25 15. Plaintiffs reported Harris’s<br/> 26 injury to their workers’<br/> 27 compensation carrier, Travelers,<br/> on October 25, 2013.</p>   | <p>15. Undisputed.</p>  |

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| <p>1 16. Travelers paid Ms. Harris over<br/>2 \$100,000 in workers'<br/>3 compensation benefits.<br/>4<br/>5<br/>6<br/>7</p> <p>8 17. On or about November 14,<br/>9 2014, Plaintiffs tendered the<br/>10 defense of the Harris suit to<br/>11 Homeland.<br/>12</p> <p>13 18. In their tender on or about<br/>14 November 14, 2014, Plaintiffs<br/>15 sent Homeland a copy of the<br/>16 complaint from Harris's lawsuit<br/>17 and materials from Travelers'<br/>18 workers' compensation file.<br/>19</p> <p>20 19. The Travelers file showed that<br/>21 Plaintiffs had submitted Harris's<br/>22 claim for compensation under<br/>23 their workers' compensation<br/>24 coverage on October 25, 2013.<br/>25</p> <p>26 20. The Travelers file also showed<br/>27 that, by November 2014,<br/>28 Travelers had deemed the<br/>worker's compensation claim to<br/>be "uncontroverted" and had<br/>paid Harris benefits exceeding<br/>\$100,000.</p> | <p>16. Undisputed Travelers initially<br/>paid Harris's workers comp<br/>claim. Disputed as to whether<br/>Travelers was ultimately<br/>responsible for paying workers<br/>comp benefits or not.<br/><br/>Huver Dec., ¶16 and Ex. 1,<br/>Frenner Dep, at 68:25 - 69:25;<br/>85:4-9; 91:6-9. Huver Dec.,<br/>¶17 and Ex. 2, Ringland Dep,<br/>at 81:5-17.</p> <p>17. Undisputed.</p> <p>18. Disputed. The tender of the<br/>Harris complaint and other<br/>documents was made by Jared<br/>Moen of Marsh Risk &amp;<br/>Insurance Services.<br/><br/>Frenor Declaration,<br/>Paragraph 4, 5, 6.</p> <p>19. Plaintiffs object to this "fact"<br/>on the grounds it is vague and<br/>ambiguous as to time.<br/>However, without waiving<br/>said objection, undisputed a<br/>worker comp claim was<br/>submitted, disputed as to<br/>exactly who submitted the<br/>claim.</p> <p>20. Plaintiffs' object to the phrase<br/>"uncontroverted" as vague,<br/>ambiguous and unintelligible<br/>in the context of this motion,<br/>and assumes facts not in<br/>evidence. Without waiving<br/>said objections, disputed. No<br/>evidence exists that Travelers<br/>was made aware that Ms.<br/>Harris claimed she was outside<br/>the course and scope of her job<br/>when injured. Travelers<br/>accepted the claim and was not<br/>a party to the November 2014</p> |
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lawsuit Harris filed. Further, there was never a final determination by any workers compensation board or administrative judge adjudicating the issue of Harris' course and scope status. Finally, there is no exclusion in The Policy which precludes a defense if Harris had a pending workers comp claim.

Huver Dec., ¶16 and Ex. 1, Freaner Dep, at 74:2-11; 85:4-9; 91:6-9; 184:18-22; 185:15-25; 186:23 - 187:10. Huver Dec., ¶17 and Ex. 2, Ringland Dep, at 81:5-17; 83:15 - 84:6; 120:8-11; 124:3-8.

21. Homeland called both Travelers (the workers' compensation carrier) and Plaintiffs' insurance broker, and both confirmed that Harris was receiving workers' compensation benefits for the accident.

21. Plaintiffs object to this "fact" on the grounds it is hearsay without exception, is compound and is irrelevant to defendants' duty to defend. However, without waiving said objections, undisputed that Homeland had information that Harris was receiving workers comp benefits. However, defendants never asked Travelers whether Harris was or was not in the course and scope of her employment and never advised Travelers Harris had filed a lawsuit alleging she was not in the course and scope of employment. Finally, there is no exclusion in The Policy which precludes a defense if Harris had a pending workers comp claim.

Huver Dec., ¶16 and Ex. 1, Freaner Dep, at 74:2-11; 85:4-9; 91:6-9; 184:18-22; 185:15-25; 186:23 - 187:10. Huver Dec., ¶17 and Ex. 2, Ringland Dep, at 81:5-17; 83:15 - 84:6; 120:8-11; 124:3-8.



22. On November 19, 2014, Homeland told plaintiff Plum and Plaintiffs' insurance broker that it concluded the claim was not covered because, based on the workers' compensation involvement, the insured vs. insured exclusion applied.

23. Neither Plum nor Plaintiffs' broker told Homeland that it was mistaken about any facts or that it owed a defense.

24. On December 9, 2014, Homeland sent Plaintiffs a letter (i) explaining the basis for its coverage determination, (ii) reserving its rights to rely on other policy provisions, and (iii) asking Plaintiffs to "advise us of any information that you have that you believe may affect our determination concerning coverage available under the Homeland policy."

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22. Undisputed that defendants denied plaintiffs a defense. Disputed that defendants' position was correct.

See Plum's Separate Statement of Disputed and Undisputed Facts ("PSSF No. \_\_\_"), Nos. 4-6, 8, 9-18, 22-36, 53-54, 78-105.

23. Plaintiffs object to this "fact" as compound and vague and ambiguous. Without waiving said objections, disputed. Plaintiffs repeatedly advised defendants they owed a defense against the Harris lawsuit.

Huver Dec., ¶16 and Ex. 1, Freaner Dep, at 135:3-15; 135:25 - 137:14; 139:3 - 140:7. Defs' Ex. 6, pgs. 153-154.

24. Undisputed defendants sent the letter. Disputed the basis for denying plaintiffs' claim was reasonable or proper. Moreover, the denial letter fully articulated defendants' positions as to the claim and asserted only Exclusion (D)(7), defendants denied any coverage and consciously decided not to defend under a reservation of rights, thereby waiving any other rights it may have had.

Huver Dec., ¶16 and Ex. 1, Freaner Dep, at 55:17 - 56:18; 58:24 - 59:12; 121:6-12; 121:21 - 122:6; 156:5-19. Huver Dec., ¶17 and Ex. 2, Ringland Dep, at 44:13-17; 142:24 - 143:7; 144:1-21; 178:4-24.



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| <p>1 25. Homeland heard nothing further<br/>2 from Plaintiffs until February<br/>3 16, 2015, when it received a<br/>letter from Plum Healthcare's<br/>president Toby Tilford.</p> <p>4 26. Tilford's letter did not provide<br/>5 any new facts, but asserted that<br/>6 Harris's allegation in paragraph<br/>7 22 that she was not in the course<br/>and scope of employment was<br/>sufficient to trigger the duty to<br/>defend.</p> <p>8 27. Homeland immediately<br/>9 acknowledged the letter and<br/>10 hired independent coverage<br/>11 counsel, Marc Shrake of<br/>12 Anderson, McPharlin &amp;<br/>13 Conners, to help evaluate<br/>14 coverage.</p> <p>15</p> <p>16 28. On March 20, 2015, Shrake sent<br/>17 a letter to Tilford responding to<br/>18 his argument based on<br/>19 paragraph 22 and concluding<br/>20 that the complaint did not<br/>21 trigger a duty to defend.</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p>26 ///</p> <p>27 ///</p> <p>28 ///</p> | <p>25. Undisputed.</p> <p>26. Undisputed that Plum made it<br/>clear that Harris could not be<br/>an "Insured" if she was<br/>outside the course and scope<br/>of her duties, as she alleged.<br/><br/>Defs' Ex. 6, pgs. 153-154.</p> <p>27. Disputed as to the word<br/>"immediately." Undisputed<br/>that Marc Shrake acted solely<br/>for defendants' interests as an<br/>advocate. Moreover,<br/>defendants are not relying on<br/>the advice of counsel as a<br/>defense and therefore, Mr.<br/>Shrake's involvement is<br/>irrelevant.<br/><br/>See Plaintiffs' Objections to<br/>Evidence, pg. 4, and Docket<br/>No. 19.</p> <p>28. Undisputed that Mr. Shrake<br/>sent a letter dated March 20,<br/>2015. Disputed that it<br/>responded to plaintiffs'<br/>request to defend them against<br/>the Harris lawsuit. Disputed<br/>that the duty to defend was not<br/>triggered. Moreover,<br/>defendants are not relying on<br/>the advice of counsel as a<br/>defense and therefore, Mr.<br/>Shrake's involvement is<br/>irrelevant.<br/><br/>See Plaintiffs' Objections to<br/>Evidence, pg. 4, and Docket<br/>No. 19.</p> |
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29. On May 11, 2015, Homeland spoke with Tilford and Paul Hubbard – the co-CEO of Plum Healthcare. Hubbard stated that Harris (i) was an employee at the time of the accident, (ii) was expected to be at the budget retreat as part of her employment, and (iii) was paid for her attendance.

30. Homeland heard nothing further from Plaintiffs until early June 2015, when it received a letter from Plaintiffs' coverage counsel, William Pruitt of Kirkland & Ellis.

31. On June 25, Shrake responded to Pruitt's letter stating that (i) he disagreed with Pruitt's legal analysis, but (ii) Homeland was willing to meet with him and Plaintiffs to try to resolve the dispute.

29. Undisputed a conversation took place on May 11, 2015. Disputed that Ringland asked or that Hubbard told Ringland that Harris was an "Insured" at the time of the accident per the terms of The Policy, or that Harris was "expected" to ride the ATVs or shoot guns during her free time. Also disputed that Plum was asked if Harris was an "Employee" at the time of the accident. Defendants only asked if Harris was an employee but ignored the course and scope question they now admit was critical.

Huver Dec., ¶16 and Ex. 1, Freaner Dep, at 71:9-25; 72:23 - 73:25. Huver Dec., ¶17 and Ex. 2, Ringland Dep, at 184:25 - 185:7; 186:8-12.

30. Plaintiffs object to this "fact" as irrelevant. Defendants refused to defend plaintiffs against the Harris lawsuit, despite repeated requests. Plaintiffs had no duty to continue to request that defendants comply with their legal and contractual obligations and defend them against Ms. Harris's lawsuit.

31. Undisputed that Mr. Shrake sent a letter dated June 25, 2015. Disputed that it responded to plaintiffs' request to defend them against the Harris lawsuit. Disputed that the duty to defend was not triggered. Moreover, defendants are not relying on the advice of counsel as a defense and therefore, Mr. Shrake's involvement is irrelevant.

See Plaintiffs' Objections to Evidence, pg. 4, , and Docket No. 19.

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| <p>1 32. On July 21, 2015, the parties</p> <p>2 met as Shrake had proposed.</p> <p>3 The parties, however, were</p> <p>4 unable to reach agreement as to</p> <p>5 the duty to defend.</p>  | <p>32. Undisputed that defendants</p> <p>persisted in refusing to defend</p> <p>plaintiffs.</p>  |
| <p>6 33. On August 4, 2015, Shrake sent</p> <p>7 a letter to Pruitt pointing out</p> <p>8 cases that he felt supported the</p> <p>9 conclusion that Homeland owed</p> <p>10 no duty to defend.</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> | <p>33. Plaintiffs object to this “fact”</p> <p>on the grounds it calls for</p> <p>speculation as to the state of</p> <p>mind of Shrake. However,</p> <p>without waiving said</p> <p>objection, undisputed that</p> <p>Shrake sent the letter relying</p> <p>on inapposite cases to support</p> <p>defendants’ wrongful denial of</p> <p>plaintiffs’ claim and that Mr.</p> <p>Shrake refused to concede</p> <p>what Homeland “admits” it</p> <p>always knew: that if Harris’s</p> <p>allegations were correct, she</p> <p>would not be an “Insured” and</p> <p>she could therefore recover</p> <p>damages; that Homeland knew</p> <p>Harris’s allegations were</p> <p>disputed, unproven and</p> <p>inconclusive either way.</p> <p>Moreover, defendants are not</p> <p>relying on the advice of</p> <p>counsel as a defense and</p> <p>therefore, Mr. Shrake’s</p> <p>involvement is irrelevant.</p> <p>Huver Dec., ¶16 and Ex. 1,</p> <p>Freaner Dep, at 68:25 - 69:25;</p> <p>85:4-9; 96:18 - 97:13; 101:14-</p> <p>25; 103:8-14; 106:10-24;</p> <p>109:5-10. Huver Dec., ¶17 and</p> <p>Ex. 2, Ringland Dep, at 96:1 -</p> <p>98:9; 101:12 - 102:8; 106:12 -</p> <p>107:9; 109:7 - 110:1; 126:14-</p> <p>25; 130:2-9; 182:7 - 183:2.</p> <p>See also Plaintiffs’ Objections</p> <p>to Evidence, pg. 4, and Docket</p> <p>No. 19.</p> |
| <p>24 34. Plaintiffs admit that Homeland</p> <p>25 was “professional” and</p> <p>26 “respectful” throughout the</p> <p>claim handling process.</p> <p>27 ///</p> <p>28 ///</p>   | <p>34. Plaintiffs object to this “fact”</p> <p>on the grounds it is misleading</p> <p>and irrelevant.</p>  |

1 35. In the litigation with Harris,  
 2 Plaintiffs admitted in discovery  
 3 responses that "Harris was on a  
 4 work-related event at all times  
 5 relevant to the subject  
 6 litigation" and that her injuries  
 7 "arose out of and in the course  
 8 of her employment."

17 36. The budget retreats, like the one  
 18 at which Harris was injured,  
 19 were an annual event.  
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35. Plaintiffs object to these  
 "facts" on the grounds they are  
 irrelevant to the issue of the  
 duty to defend, which is based  
 on the information defendants  
 knew at the time of the denial.  
 Defendants never knew or  
 relied on events that occurred  
 during the litigation, which  
 was long after they denied  
 Plaintiffs' claim. *See North  
 Counties Engineering v. State  
 Farm* (2014) 224 Cal.App.4th  
 902, 909. Further, plaintiffs  
 object to the word "admitted"  
 on the grounds it is  
 argumentative. Without  
 waiving said objections, is it  
 undisputed that after  
 defendants refused to defend  
 Plum against the Harris  
 lawsuit, Plum asserted as one  
 of several affirmative defenses  
 that Ms. Harris's exclusive  
 remedy was workers  
 compensation, which she  
 disputed. The affirmative  
 defenses raised by plaintiffs  
 after being denied a defense of  
 the Harris lawsuit are not  
 conclusive proof.

36. Plaintiffs object to this "fact"  
 on the grounds it is vague,  
 ambiguous and irrelevant. As  
 the incident occurred during  
 Harris's first "budget retreat,"  
 what did or did not happen at  
 any prior "annual budget  
 retreat" is irrelevant. FRE  
 402, 403. However, without  
 waiving said objections,  
 disputed. Harris's complaint  
 alleged the afternoon was for  
 free-time, did not involve  
 budget-related work, the  
 retreat was scheduled for a  
 resort in June Lake, CA, not  
 Bishop, and the Rhino ATV  
 riding was not part of her job  
 duties and responsibilities.

PSSF Nos. 55, 57, 61.

- 1 37. The retreats were mandatory for invitees, including Harris.  
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12 38. The purpose of the retreat at which Harris was injured was to present each facility's budget, to participate in teambuilding, to collaborate with peers, and receive training and education.  
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19 39. The RHINO activity was part of the teambuilding agenda.  
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37. Plaintiffs object to this "fact" on the grounds the word "mandatory" is vague and ambiguous, and on the ground the "fact" as phrased is misleading. Moreover, reference to any prior "annual budget retreat" is inadmissible evidence. FRE 402, 403. Without waiving said objections, undisputed that attendance at budget meetings was required. Disputed that recreational activities were required.
- Huver Dec., ¶18 and Ex. 3, Romero Dep, at 34:21 - 35:4; 39:17-25; 45:19- 46:8; 56:23 - 57:12; 73:24 - 74:12; 74:13-19; 109:6-25.
38. Undisputed that was Mr. Romney testified to in deposition. Also undisputed the purpose of the retreat was to work on budgeting, not to ride ATVs or shoot guns.
- Huver Dec., ¶18 and Ex. 3, Romero Dep, at 34:21 - 35:4; 35:5-10; 39:17-25; 45:19-46:8; 56:23 - 57:12; 73:24 - 74:12; 74:13-19; 109:6-25.
39. Disputed. Harris alleged the Rhino ATV activity was not part of her job duties or responsibilities as DON. The ATV riding was a last-minute, surprise change made by Craig Clayton without permission and was not part of the planned agenda. The budget retreat was scheduled for June Lake, CA, not Bishop, CA. Undisputed riding ATVs was not within Harris's job duties and responsibilities as DON. This issue remained in dispute during and was never resolved in the Harris litigation.

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40. Upon being informed of the RHINO activity, Harris said she did not want to participate in it, but she felt compelled to do so.
41. The Industrial Commission of Arizona twice made findings that Harris “sustained a compensable injury by accident arising out of and in the course of employment on 10/22/2013.”
40. Plaintiffs object to this “fact” on the grounds the evidentiary support is hearsay without exception. FRE 802, 803, 804.
41. Plaintiffs object to this alleged “fact” on the grounds it is irrelevant to the duty to defend issue. The documents are dated April 21, 2015, 5 months **after** Homeland’s initial denial. Therefore, these were not “known” by or relied on by Homeland **before** they denied coverage. Homeland admitted it only relied on 5 pieces of paper from a Travelers’ workers comp file as the basis for its denial.
- Moreover, there were no legal “findings” and no adjudication by any workers compensation court as to Harris’s course and scope status. Plaintiffs further object to the term “findings” as lacking foundation, assuming facts not in evidence, and hearsay on the subject of determining the legal question of whether Harris was an “Insured” under defendants’ policy. FRE 602, 701, 702, 802, 803, 804. Without waiving said objections, disputed. Defendants admit there was no evidence in the 5 pieces of paper from Travelers at the time the claim was denied which conclusively determined Harris’s status re course and scope.

1 Huver Dec., ¶16 and Ex. 1,  
 2 Freaner Dep, at 68:25 - 69:25;  
 3 85:4-9; 86:20 - 87:9; 91:6-9;  
 4 96:18 - 97:13; 101:14-25;  
 5 103:8-14; 106:10-24; 109:5-  
 6 10; 181:22 - 182:1; 184:4-17;  
 7 184:18-22; 185:15-25; 186:23  
 8 - 187:10. Huver Dec., ¶17 and  
 9 Ex. 2, Ringland Dep, at 81:5-  
 10 17; 94:5-18.

11 42. In November 2015, Plaintiffs  
 12 and Harris settled for \$775,000  
 13 plus an agreement by Plaintiffs  
 14 to pay a portion of the workers'  
 15 compensation insurer's liens.

16 42. Undisputed that after  
 17 defendants refused to defend  
 18 or indemnify Plum, they  
 19 reached a settlement to avoid  
 20 potential liability in excess of  
 21 \$4,000,000, potential exposure  
 22 on multiple cross-complaints,  
 23 and additional legal expenses  
 24 of at least \$200,000.

25 Declaration of William Wilson  
 26 ("Wilson Dec., ¶\_\_,"), ¶4-9.

27 43. Plaintiffs moved for a  
 28 determination of good faith  
 settlement.

43. Undisputed.

44. In moving for a good faith  
 determination, Plaintiffs argued  
 that the settlement as within the  
*Tech-Bilt* "ballpark" because (i)  
 Harris was an employee, (ii) the  
 injury occurred during a  
 "corporate team building  
 activity" during an "organized  
 budget retreat," and (iii)  
 therefore, workers'  
 compensation was Harris'  
 exclusive remedy.

44. Undisputed Plum referenced  
 various affirmative defenses  
 raised in the Harris lawsuit in  
 support of their motion for a  
 good faith settlement. Also  
 undisputed the settlement was  
 reached to avoid potential  
 exposure in excess of  
 \$4,000,000, potential exposure  
 on multiple cross-complaints,  
 and additional legal expenses  
 of at least \$200,000. Disputed  
 that the affirmative defenses  
 somehow equate to conclusive  
 proof of any issue.

Wilson Dec., ¶4-9.

45. The superior court granted  
 Plaintiffs' motion for a good  
 faith settlement determination.

45. Undisputed.



46. In total, Plaintiffs' defense costs during the entirety of the Harris litigation were only about \$112,500.

46. Undisputed that plaintiffs incurred \$112,500 in legal expenses and \$825,000 in losses related to the settlement with Ms. Harris and Travelers, for total damages under The Policy of \$937,500, plus interest.

Pursuant to Local Rule 7.1(f)(3), Plum submits the following statement of disputed and undisputed material facts in opposition to Homeland's motion for summary judgment or partial summary judgment.

**DISPUTED/UNDISPUTED FACTS AND EVIDENCE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

**ISSUE: HOMELAND HAS ADMITTED THE FOLLOWING FACTS BY VIRTUE OF FAILING TO TIMELY RESPOND TO PLUM'S REQUESTS FOR ADMISSION**

**Plaintiffs' Disputed/Undisputed Material Facts and Supporting Evidence:**

**Defendants' Response and Supporting Evidence:**

1. Janice Harris' injury on October 22, 2013 involved a "non-owned" vehicle.

1.

Huver Dec., ¶12 and Ex. 10, pg. 187, RFA No. 1.

2. Exclusion (B)(9) did not preclude coverage for the claim made by Janice Harris against your insureds.

2.

Huver Dec., ¶12 and Ex. 10, pg. 187, RFA No. 2.

3. Homeland was not aware of any available automobile coverage for GI Plum for the claims made by Janice Harris.

3.

Huver Dec., ¶12 and Ex. 10, pg. 187, RFA No. 3.

1 4. Janice Harris' complaint 4.  
 2 alleged that she was not in the  
 3 course and scope of her job at  
 the time she was injured on  
 October 22, 2013.

4 Huver Dec., ¶12 and Ex. 10,  
 5 pg. 187, RFA No. 4.

6 5. If the allegations in paragraph 5.  
 7 22 of Janice Harris' complaint  
 were true, she would not have  
 8 been an "insured" at the time  
 of her injury on October 22,  
 9 2013.

10 Huver Dec., ¶12 and Ex. 10,  
 pg. 187, RFA No. 5.

11 6. No judge or jury had ever 6.  
 12 determined if Janice Harris  
 was or was not in the course  
 13 and scope of her job duties  
 when she was injured on  
 14 October 22, 2013.

15 Huver Dec., ¶12 and Ex. 10,  
 pg. 187, RFA No. 6.

16 7. Homeland Insurance is a 7.  
 17 wholly owned subsidiary of  
 One Beacon Professional  
 18 Insurance Company.

19 Huver Dec., ¶12 and Ex. 10,  
 pg. 187, RFA No. 7.

20 8. Homeland should have 8.  
 21 provided a legal defense to  
 plaintiffs Plum Healthcare and  
 22 GI Plum Holdco in the Janice  
 Harris lawsuit.

23 Huver Dec., ¶12 and Ex. 10,  
 24 pg. 187, RFA No. 8.

25 ///

26 ///

27 ///

28 ///

**ISSUE: THE FACTUAL ALLEGATIONS IN HARRIS'S LAWSUIT  
ALLEGED A COVERED CLAIM THAT TRIGGERED  
HOMELAND'S DUTY TO DEFEND**

**Plaintiffs' Disputed/Undisputed  
Material Facts and Supporting  
Evidence:**

**Defendants' Response and  
Supporting Evidence:**

9. The Policy required Homeland to defend Plum against the Harris lawsuit.

9.

Defs' Ex. 1, pgs. 11, 43-44, 46-48, 51-52, 63. See also Defs' Separate Statement of Facts ("DSSF"), Nos. 1, 2, 4, 5.

10. Plaintiffs herein were Insureds under the terms of The Policy when the Harris lawsuit was tendered for a defense.

10.

Docket No. 10, Defs' Answer to Complaint, pg. 3, ¶¶ 8, 9, 10, 11. See also DSSF Nos. 1, 2, 4, 5.

11. Paragraph 14 of Harris's complaint contained the following specific factual allegation:

11.

On October 22, 2013, at approximately 5:00 p.m., Plaintiff JAN HARRIS was severely injured while riding as a passenger in a modified Yamaha Rhino side-by-side off-road vehicle (hereinafter the "SUBJECT RHINO") negligently, wantonly and recklessly operated by Defendant CHRISTOPHER ROMNEY.

Defs' Ex. 1, pg. 114, ¶14.

///

///

///

1 12. Paragraph 15 of Harris's complaint contained the following specific factual allegations: 12.

2  
3 Plaintiff had (sic) travelled to Bishop, California for the purpose of attending a budget retreat organized and arranged by PLUM HEALTHCARE ENTITIES and Defendants ROMNEY, QUINCE, CLAYTON, CLAWSON and the BISHOP CARE CENTER. The location of the planned retreat was at a resort hotel in June Lake, California. ...

4  
5  
6  
7  
8  
9  
10 Defs' Ex. 1, ¶15, pg. 114.

11 13. Paragraph 16 of Harris's complaint contained the following factual allegations: 13.

12  
13 "Plaintiff arrived in Bishop, California on the afternoon of October 22, 2013, where she met with the other individuals [sic] travelling to the retreat. After eating a box lunch at Defendants LAWS RAILROAD MUSEUM, all present, including Plaintiff, were supposed to have the afternoon free to shop at stores along Main Street in Bishop. The agenda for the retreat, which was circulated to attendees beforehand, planned for "shopping along Bishop's Main Street," prior to departing for June Lake. ...for the retreat."

14  
15  
16  
17  
18  
19  
20  
21  
22 Defs' Ex. 3, pg. 114-115, ¶16.

23 14. Paragraph 17 of Harris's complaint contained the following specific factual allegations: 14.

24  
25 "However, after eating lunch at the LAWS RAILROAD MUSEUM, it was announced to

1 Plaintiff and the other attendees  
 2 that a surprise change had been  
 3 made to the agenda. Plaintiff  
 4 and the other attendees were  
 5 driven in vans a short distance  
 6 to an outdoor location, where a  
 7 shooting range and several  
 8 Yamaha Rhino side-by-side off-  
 9 road vehicles were parked. ...  
 Plaintiff and others were told  
 not to speak with anyone about  
 this surprise change in the  
 agenda, because permission had  
 not been obtained to engage in  
 the shooting and off-road  
 activities. ...

10 Defs' Ex. 3, pg. 115, ¶17.

11 15. Paragraph 22 of Harris's 15.  
 12 complaint contained the  
 13 following specific factual  
 allegation:

14 "These events and Plaintiff's  
 15 severe injuries occurred outside  
 16 the scope of her employment as  
 QUINCE's director of nursing.  
 17 The Rhino and shooting  
 18 activities that occurred on  
 19 October 22, 2013 were  
 20 unplanned and unrelated to  
 Plaintiff's work duties as  
 21 Director of Nursing, but rather  
 22 involved participation in an off-  
 23 duty event negligently  
 24 organized, planned and carried  
 25 out by Defendants."

26 Defs' Ex. 3, pg. 116, ¶22.

27 16. The specific factual allegations 16.  
 28 in Harris' complaint, including  
 paragraphs 14, 15, 16, 17 and  
 22, **if proven true**, asserted at  
 least a potentially covered claim  
 and therefore triggered  
 Homeland's duty to defend  
 Plum.

Defs' Ex. 1, pgs. 11, 43-44, 46-  
 48, 51-52, 63. Huver Dec., ¶16  
 and Ex. 1, Freaner Dep, at 62:16

1 - 63:4; 78:25 - 77:23; 95:23 -  
 2 96:5; 116:10-14; 149:23 -  
 3 150:5. Huver Dec., ¶17 and Ex.  
 2, Ringland Dep, at 29:11-19;  
 154:23 - 155:19.

4 17. Homeland did not know if 17.  
 5 Harris's allegations in  
 6 paragraphs 14, 15, 16, 17 and 22  
 were true or false when they  
 denied Plum a defense.

7 Huver Dec., ¶16 and Ex. 1,  
 8 Freaner Dep, at 80:20 - 81:19;  
 9 95:23 - 96:5; 116:10-14; 149:23  
 - 150:5. Huver Dec., ¶17 and  
 10 Ex. 2, Ringland Dep, at 96:1 -  
 107:9; 101:12 - 102:8; 106:12 -  
 11 107:9; 109:7 - 110:1; 126:14-  
 25; 130:2-9.

12 18. Harris's complaint alleging 18.  
 13 bodily injuries based on claims  
 14 of negligence against Plum and  
 others was a covered claim.

15 Huver Dec., ¶17 and Ex. 2,  
 16 Ringland Dep, at 154:23 -  
 155:19.

17 19. Plum Healthcare Group, LLC, 19.  
 18 incurred \$112,500 in attorneys  
 19 fees and costs to defend against  
 the Harris v. Plum Healthcare  
 Group, LLC, et al., lawsuit.

20 Wilson Dec., ¶10, and Ex. 6,  
 21 pgs. 6-62.

22 20. The Policy's \$250,000 20.  
 23 deductible applied to the  
 24 combined legal defense  
 25 expenses of \$112,500, and the  
 \$825,000 settlement under the  
 indemnity coverage for  
 "Losses."

26 Defs' Ex. 1, Section  
 27 IV(A)(7)(a), pgs. 64-65.

28 ///

21. Homeland's obligation to indemnify a "Loss" is in excess of \$250,000, but the duty to defend is triggered immediately upon tender of a claim or a potentially covered claim.

Defs' Ex. 1, Section I(F), pg. 44 and Section IV(A)(7)(a), pgs. 64-65.

**ISSUE: THE 5 PIECES OF PAPER FROM TRAVELERS' WORKERS COMPENSATION FILE DID NOT CONCLUSIVELY ESTABLISH HARRIS WAS IN THE COURSE AND SCOPE OF HER JOB DUTIES WHEN INJURED**

**Plaintiffs' Disputed/Undisputed Material Facts and Supporting Evidence:**

**Defendants' Response and Supporting Evidence:**

22. The only "extrinsic" documents Homeland relied on to deny Plum a defense were the 5 pieces of paper from Travelers' file which merely showed Harris had received some benefits from an open workers comp claim.

Huver Dec., ¶16 and Ex. 1, Freaner Dec, at 86:20 - 87:9; 181:22 - 182:1; 184:4-17. Huver Dec., ¶17 and Ex. 2, Ringland Dep, at 94:5-18.

23. When Homeland denied Plum a defense, they knew Harris had not hired an attorney to represent her for her workers comp claim.

Huver Dec., ¶17 and Ex. 2, Ringland Dep, at 91:14 - 92:13.

24. The 5 pieces of paper from Travelers' workers comp file did not conclusively negate the possibility that Harris's complaint alleged a potentially covered claim.



1       Huver Dec., ¶16 and Ex. 1,  
 2       Freaner Dep, at 85:4-9; 91:6-  
 3       9; 184:18-22; 185:15-25;  
 4       186:23 - 187:10. Huver Dec.,  
       ¶17 and Ex. 2, Ringland Dep,  
       at 81:5-17; 94:5-18.

5       25.   None of the 5 pieces of paper                               25.  
 6       from Travelers' workers comp  
 7       file indicated a legal  
 8       adjudication had been made  
       that Harris was in the course  
       and scope of her job duties  
       when she was injured.

9       Huver Dec., ¶16 and Ex. 1,  
 10       Freaner Dep, at 184:18-22;  
 11       185:15-25; 186:23 - 187:10.  
 12       Huver Dec., ¶17 and Ex. 2,  
       Ringland Dep, at 81:5-17;  
       94:5-18.

13       26.   Homeland did not have any                               26.  
 14       information that a formal  
 15       determination had been made  
 16       by any workers comp judge or  
 17       appeals board that Harris was  
       in the course and scope of her  
       job duties when they denied  
       Plum's claim for a defense.

18       Huver Dec., ¶16 and Ex. 1,  
 19       Freaner Dep, at 68:25 - 69:25;  
 20       85:4-9; 91:6-9; 184:18-22;  
 21       185:15-25; 186:23 - 187:10.  
       Huver Dec., ¶17 and Ex. 2,  
       Ringland Dep, at 81:5-17.

22       27.   Homeland never informed                               27.  
 23       Travelers that Harris had filed  
 24       a civil lawsuit alleging she  
       was **not** within the course and  
       scope of her job duties.

25       Huver Dec., ¶16 and Ex. 1,  
 26       Freaner Dep, at 74:2-11.  
 27       Huver Dec., ¶17 and Ex. 2,  
       Ringland Dep, at 83:15 - 84:6.

28       ///

28. There is no exclusion in The Policy which negates coverage just because Harris was pursuing both a workers comp claim and a civil lawsuit.

Huver Dec., ¶17 and Ex. 2, Ringland Dep, at 120:8-11; 124:3-8.

**ISSUE: HOMELAND DID NOT CONCLUSIVELY ESTABLISH THE “INSURED V. INSURED” EXCLUSION (D)(7) NEGATED COVERAGE. HARRIS’S COURSE AND SCOPE ISSUE WAS IN DISPUTE WHEN HOMELAND REFUSED TO DEFEND PLUM**

**Plaintiffs’ Disputed/Undisputed Material Facts and Supporting Evidence:**

**Defendants’ Response and Supporting Evidence:**

29. The only policy exclusion Homeland relied on to deny Plum a defense was the “Insured v. Insured” Exclusion (D)(7).

Huver Dec., ¶16 and Ex. 1, Freaner Dep, at 121:6-12; 121:21 - 122:6; 137:15 - 138:11. Huver Dec., ¶17 and Ex. 2, Ringland Dep, at 142:24 - 143:7; 144:1-21; 178:2-24. Defs’ Ex. 5, pgs. 147-151.

30. Homeland knew Exclusion (D)(7) would only apply if Harris was an “Insured” as defined by The Policy, requiring that she was both (1) an “Employee” and (2) “only when such Employee ... is acting within the capacity and scope of his or her duties as such;...”

Defs’ Ex. 1, Section II, Definitions (T)(2), pgs. 47-48. (Emphasis added.) Huver Dec., ¶16 and Ex. 1, Freaner Dep, at 78:6-15; 94:25 - 95:22; 95:23 - 96:5; 113:15 -

114:4; 116:10-14; 123:6-19;  
124:9-20; 126:2-9; 149:23 -  
150:5. Huver Dec., ¶17 and  
Ex. 2, Ringland Dep, at 103:8-  
23; 104:11-15; 105:21 - 106:4.

31. Homeland knew if Harris's 31.  
allegations in her complaint,  
including paragraphs 14, 15,  
16, 17 and 22, were true,  
Harris would not be an  
"Insured" under the terms of  
the Policy and the "Insured v.  
Insured" Exclusion (D)(7)  
would not negate coverage.

Huver Dec., ¶16 and Ex. 1,  
Freaner Dep, at 78:6-15; 94:25  
- 95:22; 95:23 - 96:5; 116:10-  
14; 123:6-19; 124:9-20;  
126:2-9; 149:23 - 150:5.  
Huver Dec., ¶17 and Ex. 2,  
Ringland Dep, at 103:9-23;  
104:11-15; 105:21 - 106:4.

32. Homeland knew Exclusion 32.  
(D)(7) did not apply just  
because Harris was receiving  
workers comp benefits.

Huver Dec., ¶16 and Ex. 1,  
Freaner Dep, at 123:6-19;  
124:9-20; 126:2-9. Huver  
Dec., ¶17 and Ex. 2, Ringland  
Dep, at 120:8-11; 124:3-8.

33. The only documents which 33.  
Homeland relied on for  
asserting the "Insured v.  
Insured" Exclusion (D)(7)  
were the 5 pieces of paper  
from Travelers' workers  
compensation files.

Huver Dec., ¶16 and Ex. 1,  
Freaner Dep, at 86:20 - 87:9;  
181:22 - 182:1; 184:4-17.

///

///

1 34. Homeland based its entire 34.  
2 decision to deny Plum a  
3 defense on the 5 pieces of  
4 paper from the Travelers file.

5 Huver Dec., ¶16 and Ex. 1,  
6 Freaner Dep, at 86:20 - 87:9;  
7 181:22 - 182:1; 184:4-17.

8 35. No judge or jury had decided 35.  
9 that Harris was in the course  
10 and scope of her job duties and  
11 responsibilities when she was  
12 injured when Homeland  
13 denied Plum's claim.

14 Huver Dec., ¶16 and Ex. 1,  
15 Freaner Dec, at 68:25 - 69:25;  
16 85:4-9; 96:18 - 97:13; 101:14-  
17 25; 103:8-14; 106:10-24;  
18 109:5-10. Huver Dec., ¶17 and  
19 Ex. 2, Ringland Dep, at 81:5-  
20 17; 182:7 - 183:2.

21 36. At the time Homeland denied 36.  
22 Plum's claim for a defense,  
23 Homeland had not  
24 "conclusively established" that  
25 Exclusion (D)(7) precluded  
26 coverage for the claim.

27 Huver Dec., ¶16 and Ex. 1,  
28 Freaner Dep, at 68:25 - 69:25;  
78:6-15; 80:20 - 81:19; 94:25  
- 95:22; 95:23 - 96:5; 96:18 -  
97:13; 101:14-25; 103:8-14;  
106:10-24; 109:5-10; 116:10-  
14; 149:23 - 150:5. Huver  
Dec., ¶17 and Ex. 2, Ringland  
Dep, at 81:5-17; 103:8-23;  
104:11-15; 105:21 - 106:4;  
112:4-14; 182:7-19.

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1 **ISSUE: IF HOMELAND IS PERMITTED TO ASSERT NEW**  
 2 **COVERAGE DEFENSES, HOMELAND HAS FAILED TO**  
 3 **CONCLUSIVELY ESTABLISH EITHER EXCLUSION (D)(2)**  
 4 **OR (D)(5) NEGATED HOMELAND’S DUTY TO DEFEND**

4 **Plaintiffs’ Disputed/Undisputed**  
 5 **Material Facts and Supporting**  
 6 **Evidence:**

**Defendants’ Response and**  
**Supporting Evidence:**

6 37. Homeland contends Exclusion  
 7 (D)(2) precludes coverage  
 8 solely because “notice” of  
 9 Harris’s workers comp “claim”  
 10 was provided to Plum’s  
 11 workers comp insurer  
 12 Travelers.

37.

10 Defs’ Motion, pg. 11.

11 38. The Policy does not provide  
 12 coverage for workers  
 13 compensation claims.

38.

13 Defs’ Ex. 1.

14 39. Exclusion (D)(2) does not  
 15 apply because “notice” of a  
 16 workers compensation claim  
 17 has no bearing on The Policy’s  
 18 coverage.

39.

17 Defs’ Ex. 1.

18 40. Exclusion (D)(2) provides in  
 19 relevant part:

40.

20 “Except as otherwise expressly  
 21 provided in this Policy, this  
 22 Policy does not apply to, and  
 23 the Underwriter will not pay  
 24 **Loss or Defense Expenses**, for  
 25 any **Claim** based upon, arising  
 26 out of, directly or indirectly  
 27 resulting from, in consequence  
 28 of, or in any way involving  
 any actual or alleged:

\* \* \*

(2) act, error, omission.  
**Occurrence, Wrongful Act**,  
 event, suit or demand which  
 was the subject of any notice  
 given under any other policy

1 of insurance or plan or  
 2 program of self-insurance in  
 3 effect prior to the Inception  
 Date set forth in ITEM 2 of the  
 Declarations.”

4 Defs’ Ex. 1, pg. 61.

5 41. **“Claim”** is defined as “any 41.  
 6 written notice received by an  
 7 Insured that any person or  
 8 entity intends to hold an  
 Insured responsible for a  
**Wrongful Act** or an  
**Occurrence.”**

9 Defs’ Ex. 1, pg. 46.

10 42. **“Occurrence”** is defined as: 42.  
 11 “(1) with respect to **Bodily**  
 12 **Injury or Property Damage**,  
 13 an accident, including  
 14 continuous or repeated  
 15 exposure to substantially the  
 same harmful conditions,  
 which results in injury or  
 damage neither expected nor  
 intended by the Insured; and  
 16 (2) with respect to Advertising  
 Injury or Personal Injury, a  
 17 covered offense as set forth in  
 18 DEFINITIONS (C) or  
 DEFINITIONS (FF) of this  
 Policy.”

19 Defs’ Ex. 1, pg. 51.

20  
 21 43. **“Wrongful Act,”** is defined as 43.  
 22 “any **Professional Services**  
 23 **Wrongful Act or Employee**  
 24 **Benefit Wrongful Act,”**  
 25 neither of which involve a  
 claim for workers  
 compensation benefits or  
 Harris’s lawsuit for bodily  
 injuries.

26 Defs’ Ex. 1, pgs. 47, 53-55.

27 ///

28 ///

- 1 44. Harris's workers 44.  
 2 compensation claim did not  
 3 involve allegations that Plum  
 4 was liable for either an  
 5 **Occurrence** or a **Wrongful**  
 6 **Act** as defined by The Policy.  
 7  
 8 Defs' Ex. 1, pg. 46, 47, 51, 53-  
 9 55.  
 10  
 11 45. Exclusion (D)(2) does not 45.  
 12 apply because the first  
 13 "written notice" Plum received  
 14 regarding Harris's bodily  
 15 injury lawsuit was when they  
 16 were served with Harris's  
 17 complaint shortly before  
 18 tendering the claim for a  
 19 defense to Homeland.  
 20  
 21 Defs' Ex. 3, pgs. 106-130.  
 22 Freaner Dec., ¶4, 5 and Exs. 2  
 23 and 3 thereto.  
 24  
 25 46. The first insurer Plum 46.  
 26 provided "notice" to of  
 27 Harris's bodily injury lawsuit  
 28 was Homeland.  
 29  
 30 Freaner Dec., ¶4, 5 and Exs. 2  
 31 and 3 thereto.  
 32  
 33 47. The defined terms "**Claim**," 47.  
 34 "**Occurrence**" and "**Wrongful**  
 35 **Act**" do not pertain to or  
 36 involve Harris's claim for  
 37 workers compensation  
 38 benefits.  
 39  
 40 Defs' Ex. 1, pgs. 46, 51, 61.  
 41  
 42 48. Exclusion (D)(2) does not 48.  
 43 apply by its own terms  
 44 because Harris's lawsuit  
 45 sought damages for bodily  
 46 injuries, not workers  
 47 compensation benefits.  
 48  
 49 Defs' Ex. 1, pgs. 46, 51, 61.  
 50  
 51 ///   
 52 ///



1 49. Harris's lawsuit for bodily injuries did not involve a claim for a **"Professional Services Wrongful Act"** or an **"Employee Benefit Wrongful Act"** as those terms are defined in The Policy. 49.

2  
3  
4  
5 Defs' Ex. 1, pgs. 47, 53-55.  
6 Defs' Ex. 3, ¶21, pg. 116; ¶29, pg. 118; and ¶31, pg. 119.

7 50. When Homeland denied Plum's claim, even though claims adjuster Freaner and claims manager Ringland discussed Exclusion (D)(5), the only exclusion they agreed might apply was the "Insured v. Insured" Exclusion (D)(7). 50.

8  
9  
10  
11  
12 Huver Dec., ¶16 and Ex. 1, Freaner Dep, at 55:17 - 56:18; 58:24 - 59:12 121:6-12; 121:21 - 122:6; 137:15 - 138:11. Huver Dec., ¶17 and Ex. 2, Ringland Dep, at 142:24 - 143:7; 144:1-21. Defs' Ex. 5, pgs. 147-151.

16 51. By its specific terms, the "Workers Compensation" Exclusion (D)(5) does not apply to this claim because Harris's lawsuit sought damages for bodily injuries, not benefits for a workers compensation claim. 51.

17  
18  
19  
20  
21 Defs' Ex. 1, pgs. 46, 51, 61.  
22 Defs' Ex. 3, pgs. 106-130.

23 ///

24 ///

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1 **ISSUE: IF HOMELAND IS PERMITTED TO LITIGATE THE ISSUE**  
 2 **OF HARRIS'S COURSE AND SCOPE FOR PURPOSES OF**  
 3 **DETERMINING ITS DUTY TO INDEMNITY PLUM,**  
 4 **HOMELAND HAS FAILED TO MEET THEIR BURDEN OF**  
 5 **CONCLUSIVELY ESTABLISHING THAT ANY POLICY**  
 6 **EXCLUSION PRECLUDED COVERAGE. THEREFORE,**  
 7 **HOMELAND IS REQUIRED TO INDEMNIFY PLUM FOR**  
 8 **THE FULL AMOUNT OF THE HARRIS SETTLEMENT**

6 **Plaintiffs' Disputed/Undisputed**  
 7 **Material Facts and Supporting**  
 8 **Evidence:**

6 **Defendants' Response and**  
 7 **Supporting Evidence:**

8 52. Plum refers to and  
 9 incorporates herein by  
 10 reference PSSF Nos. 1-51 and  
 11 all supporting evidence.

52.

11 53. No court has ever ruled as a  
 12 matter of law that Janice  
 13 Harris was acting within the  
 14 course and scope of her job  
 15 duties and responsibilities as  
 16 DON for Pueblo Springs when  
 17 she was injured.

53.

15 Huver Dec., ¶16 and Ex. 1,  
 16 Freaner Dep, at 68:25 - 69:25.  
 17 Huver Dec., ¶17 and Ex. 2,  
 18 Ringland Dep, at 81:5-17;  
 19 182:7 - 183:2.

18 54. No jury ever rendered a  
 19 verdict finding that Janice  
 20 Harris was acting within the  
 21 course and scope of her job  
 22 duties and responsibilities as  
 23 DON for Pueblo Springs when  
 24 she was injured.

54.

22 Huver Dec., ¶16 and Ex. 1,  
 23 Freaner Dep, at 68:25 - 69:25;  
 24 85:4-9; 96:18 - 97:13; 101:14-  
 25 25; 103:8-14; 106:10-24;  
 26 109:5-10. Huver Dec., ¶17  
 27 and Ex. 2, Ringland Dep, at  
 28 182:7-19.

27 ///

28 ///

1 55. Janice Harris had been the 55.  
 2 Director of Nursing for Pueblo  
 3 Springs for about 6 months  
 when she was notified about  
 the June Lake budget retreat.

4 Huver Dec., ¶19 and Ex. 4,  
 5 Deposition of Janice Nargi  
 (formerly Janice Harris)  
 6 (“Nargi Dep.”), at 70:7-9.

7 56. John Romero was the Facility 56.  
 8 Rehabilitation Director for  
 Pueblo Springs at the time of  
 9 the June Lake budget retreat.

10 Huver Dec., ¶18 and Ex 3,  
 Romero Dep, at 12:11-24.

11 57. Harris’s job duties and 57.  
 12 responsibilities as DON did  
 not include planning for the  
 13 budget retreat.

14 Huver Dec., ¶18, and Ex. 3,  
 Romero Dep, at 26:23 - 28:7.

15 58. Harris’s job duty as DON was 58.  
 16 having full responsibility for  
 the nursing department at  
 17 Pueblo Springs, including  
 providing social services and  
 18 activities for the patients.

19 Huver Dec., ¶19 and Ex. 4,  
 Nargi Dep., at 30:15-19.

20 59. The purpose for the June Lake 59.  
 21 budget retreat was to set the  
 22 2014 budget for Pueblo  
 Springs, see where things  
 23 stood at the Pueblo facility and  
 set goals for 2014.

24 Huver Dec., ¶18 and Ex. 3,  
 Romero Dep, at 35:5-10.

26 ///

27 ///

28 ///

1 60. The printed agenda for the 60.  
 2 June Lake budget retreat was  
 3 sent to Harris and Romero  
 4 shortly before the retreat, and  
 5 did not mention riding ATVs  
 6 or shooting guns as planned  
 7 activities.

8  
 9 Defs' Ex. 1, pgs. 114-115,  
 10 ¶16. Huver Dec., ¶18 and Ex.  
 11 3, Romero Dep, at 29:10-13;  
 12 30:9-24; 31:7-25; 32:3-5.  
 13 Huver Dec., ¶20 and Ex. 5, pg.  
 14 172.

15 61. The June Lake budget retreat 61.  
 16 was the first budget retreat  
 17 Harris had attended.

18  
 19 Huver Dec., ¶18 and Ex. 3,  
 20 Romero Dep, at 34:21-35:4.

21 62. The budget retreat had been 62.  
 22 allegedly negligently planned  
 23 and organized by Bishop Care  
 24 Center and Plum Healthcare  
 25 Group, LLC.

26 Defs' Ex. 1, pg. 114, ¶15.

27 63. Janice Harris was not an 63.  
 28 employee of either Bishop  
 Care Center or Plum  
 Healthcare Group, LLC.

Huver Dec., ¶19 and Ex. 4,  
 Nargi Dep, at 30:7-19.

64. Harris understood that after 64.  
 they had lunch in Bishop, she  
 was supposed to have the  
 afternoon off for free time  
 before leaving for the budget  
 retreat which was being held  
 at a resort hotel in June Lake,  
 CA.

Huver Dec., ¶19 and Ex. 4,  
 Nargi Dep, at 139:16 - 140:12;  
 141:2 - 142:1. Defs' Ex. 3, pgs.  
 114-115, ¶16.

- 1 65. However, after lunch, Scott 65.  
 2 Clawson announced there  
 3 were surprise activities - a  
 4 shooting range and Rhino  
 5 ATVs.  
 6  
 7 Huver Dec., ¶18 and Ex. 3,  
 8 Romero Dep, at 53:2-25;  
 9 54:21-25; 56:8-22. Defs' Ex.  
 10 3, pgs. 114-115, ¶¶15, 16.  
 11
- 12 66. The shooting range and Rhino 66.  
 13 ATVs were not part of the  
 14 printed agenda for the June  
 15 Lake budget retreat.  
 16  
 17 Huver Dec., ¶18 and Ex. 3,  
 18 Romero Dep, at 56:23 - 57:12.  
 19 Huver Dec., ¶20 and Ex. 5, pg.  
 20 172.  
 21
- 22 67. Harris was not injured at the 67.  
 23 location where the budget  
 24 retreat was scheduled to take  
 25 place - a resort hotel in June  
 26 Lake - but rather in Bishop.  
 27  
 28 Defs' Ex. 1, ¶¶14, 15, 16, 17,  
 29 22, pgs. 114-116.
- 30 68. Participation in voluntary, 68.  
 31 recreational activities at  
 32 Plum's budget retreat was not  
 33 within the job duties and  
 34 responsibilities of Janice  
 35 Harris as the DON.  
 36  
 37 Huver Dec., ¶18 and Ex. 3,  
 38 Romero Dep, at 39:17-25;  
 39 45:19 - 46:8; 73:24 - 74:12;  
 40 74:13-19; 109:6-25.
- 41 69. Generally at Plum budget 69.  
 42 retreats, any voluntary,  
 43 recreational or free-time  
 44 activities that might occur  
 45 outside of the budget meetings  
 46 were not mandatory for  
 47 employees to attend.  
 48  
 49 Huver Dec., ¶18 and Ex. 3,  
 50 Romero Dep, at 39:17-25.

- 1 70. Harris and others were 70.  
 2 instructed not to tell anyone  
 3 about the surprise ATV and  
 4 gun range activities because  
 5 they had not been approved.  
 6  
 7 Defs' Ex. 3, pg. 115, ¶17.
- 8 71. While riding in the ATV, it 71.  
 9 rolled over, and Harris  
 10 suffered injuries to her right  
 11 leg and ankle, multiple  
 12 surgeries, incurred significant  
 13 medical expenses and alleged  
 14 a significant loss of earnings.  
 15  
 16 Defs' Ex. 3, ¶21, pg. 116; ¶29,  
 17 pg. 118; and ¶31, pg. 119.  
 18 Wilson Dec., ¶4, 5.
- 19 72. Plum's settlement of the 72.  
 20 Harris lawsuit occurred after a  
 21 mediation before a neutral  
 22 mediator, and was not the  
 23 product of fraud or collusion.  
 24  
 25 Wilson Dec., ¶9.
- 26 73. Homeland was invited to 73.  
 27 attend the Harris mediation but  
 28 refused to do so.  
 29  
 30 Huver Dec., ¶16 and Ex. 1,  
 31 Freaner Dep, at 169:8-25;  
 32 170:11-25. Wilson Dec., ¶9.
- 33 74. Plum Healthcare Group, LLC, 74.  
 34 paid \$775,000 to Janice Harris  
 35 to settle her bodily injury  
 36 claims alleged in the Harris v.  
 37 Plum Healthcare lawsuit only.  
 38  
 39 Wilson Dec., ¶9, 11, and Ex.  
 40 7, pg. 63.
- 41 75. Plum's settlement of the 75.  
 42 Harris lawsuit for \$825,000  
 43 was reasonable. The case had  
 44 a potential jury verdict range  
 45 of \$4 - 5,000,000, mounting  
 46 legal fees, and exposure to  
 47 multiple cross-complaints.  
 48  
 49 Wilson Dec., ¶4-9.

76. Plum Healthcare Group, LLC, 76.  
paid \$50,000 to Travelers  
Insurance Company to resolve  
the workers comp lien claim.

Wilson Dec., ¶12, and Ex. 8,  
pgs. 64-65.

**ISSUE: HOMELAND'S REFUSAL TO DEFEND AND INDEMNIFY  
PLUM AGAINST THE HARRIS LAWSUIT WAS  
UNREASONABLE AND IN BAD FAITH**

**Plaintiffs' Disputed/Undisputed  
Material Facts and Supporting  
Evidence:**

**Defendants' Response and  
Supporting Evidence:**

77. Plum refers to and 77.  
incorporates herein by  
reference PSSF Nos. 1-76 and  
all supporting evidence.

78. Homeland intentionally 78.  
rejected the factual allegations  
set forth in paragraphs 14, 15,  
16, 17 and 22 of Harris's  
complaint in order to justify its  
refusal to defend Plum.

Huver Dec., ¶16 and Ex. 1,  
Freaner Dep, at 62:16 - 63:4;  
115:8-14; 131:4-14; 143:9 -  
144:10. Huver Dec., ¶23 and  
Ex. 14, pgs. 202-206, ¶25-32,  
36-37, 42-48.

79. Homeland never looked for 79.  
facts that would have  
supported Harris's allegations  
that she was outside the course  
and scope of her job duties.

Huver Dec., ¶16 and Ex. 1,  
Freaner Dep, at 70:15-20;  
71:9-25; 72:23 - 73:25; 75:6-  
24; 75:25 - 77:23. Huver  
Dec., ¶17 and Ex. 2, Ringland  
Dep, at 96:1 - 98:9; 130:10 -  
131:4; 184:25 - 185:7; 186:8-  
21. Huver Dec., ¶23 and Ex.  
14, pg. 204, ¶36-37.



- 1 80. Homeland refused to defend Plum despite knowing they  
2 were required to do so even if  
3 there was just a “potentially”  
4 covered claim for which it  
5 might turn out later there was  
6 no covered claim.  
7  
8 Huver Dec., ¶16 and Ex. 1,  
9 Freaner Dep, at 116:19 -  
10 117:2; 117:11-25; 118:14-20;  
11 119:3-6.  
12  
13 81. Homeland denied Plum’s  
14 claim knowing they had **not**  
15 conclusively established any  
16 exclusion negated coverage.  
17  
18 Huver Dec., ¶16 and Ex. 1,  
19 Freaner Dep, at 116:19 -  
20 117:2; 117:11-25; 118:14-20;  
21 119:3-6. Huver Dec., ¶17 and  
22 Ex. 2, Ringland Dep, at 101:12  
23 - 102:8; 103:8-23; 104:11-15;  
24 106:12 - 107:9; 109:7 - 110:1;  
25 130:2-9.  
26  
27 82. Homeland claimed it was  
28 “confused” by contradictions  
between Harris’s lawsuit and  
her workers comp claim, but  
failed to comply with their  
obligation to resolve doubts  
about whether facts in Harris’s  
lawsuit triggered their duty to  
defend in favor of coverage  
for Plum.  
Huver Dec., ¶16 and Ex. 1,  
Freaner Dep, at 63:20 - 64:16;  
127:7 - 128:2; 143:9 - 144:10.  
Huver Dec., ¶17 and Ex. 2,  
Ringland Dep, at 78:8-22;  
79:12 - 80:2; 112:4-14.
80. 80.
81. 81.
82. 82.
83. 83.

Huver Dec., ¶16 and Ex. 1,  
 Freaner Dep, at 150:17-19.  
 Huver Dec., ¶17 and Ex. 2,  
 Ringland Dep, at 112:4-14;  
 130:2-9.

84. Homeland denied Plum's  
 claim for a defense and relied  
 on Exclusion (D)(7) even  
 though they did not know  
 whether participating in the  
 Rhino ATV activity was  
 within Harris's job duties as  
 DON.

Huver Dec., ¶17 and Ex. 2,  
 Ringland Dep, at 101:12 -  
 102:8; 184:25 - 185:7; 186:8-  
 12.

85. Homeland denied Plum's  
 claim for a defense without  
 ever asking Plum whether  
 participating in the Rhino  
 ATV activity was within  
 Harris's job duties as DON.

Huver Dec., ¶17 and Ex. 2,  
 Ringland Dep, at 101:12 -  
 102:8; 184:25 - 185:7; 186:8-  
 12.

86. Homeland denied Plum's  
 claim for a defense, relying  
 solely on the "Insured v.  
 Insured" Exclusion (D)(7)  
 even though they knew they  
 had not conclusively proven  
 that Harris was an "Insured."

Huver Dec., ¶16 and Ex. 1,  
 Freaner Dep, at 68:25 - 69:25;  
 78:6-15; 80:20 - 81:19; 94:25  
 - 95:22; 95:23 - 96:5; 96:18 -  
 97:13; 101:14-25; 103:8-14;  
 106:10-24; 109:5-10; 116:10-  
 14; 149:23 - 150:5. Huver  
 Dec., ¶17 and Ex. 2, Ringland  
 Dep, at 81:5-17; 103:8-23;  
 104:11-15; 105:21 - 106:4;  
 112:4-14; 182:7-19.

1 87. Homeland failed to adequately investigate Plum's claim before denying a defense. 87.

2  
3 Huver Dec., ¶16 and Ex. 1,  
4 Freaner Dep, at 70:15-20;  
5 71:9-25; 72:23 - 73:25; 75:6-  
6 24; 75:25 - 77:23. Huver  
7 Dec., ¶17 and Ex. 2, Ringland  
8 Dep, at 96:1 - 98:9; 130:10 -  
9 131:4; 184:25 - 185:7; 186:8-  
10 21.

11 88. Homeland never contacted anyone at Plum's broker to investigate whether Harris's allegations in her lawsuit that she was outside the course and scope of her job duties were potentially true. 88.

12 Huver Dec., ¶16 and Ex. 1,  
13 Freaner Dep, at 70:15-20;  
14 71:9-25.

15 89. Homeland never asked Plum whether Harris's allegations that she was outside the course and scope of her job duties were true or not. 89.

16  
17 Huver Dec., ¶16 and Ex. 1,  
18 Freaner Dep, at 71:9-25.  
19 Huver Dec., ¶17 and Ex. 2,  
20 Ringland Dep, at 96:1 - 98:9;  
21 102:9-14; 184:25 - 185:7;  
22 186:8-12.

23 90. Homeland never contacted Harris or her lawyers to investigate whether the complaint's allegations that she was not in the course and scope of her job duties were true or not. 90.

24  
25 Huver Dec., ¶16 and Ex. 1,  
26 Freaner Dep, at 75:25 - 77:23.  
27 Huver Dec., ¶17 and Ex. 2,  
28 Ringland Dep, at 88:24 -  
89:12; 90:21-25.

- 1 91. No one at Plum ever told 91.  
 2 Homeland that Harris was  
 3 acting within the course and  
 4 scope of her job duties as  
 5 DON because Homeland never  
 6 asked that question.  
 7  
 8  
 9  
 10  
 11  
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 28
- Huver Dec., ¶17 and Ex. 2,  
 Ringland Dep, at 102:9-14.
92. Homeland ignored Plum's 92.  
 pleas for a defense, rejecting  
 out of hand Plum's CEO's  
 letter pointing to Harris's  
 allegations in her complaint.  
 Freaner Dec., ¶15-17. Huver  
 Dec., ¶16 and Ex. 1, Freaner  
 Dep, at 135:3-15; 135:25 -  
 137:14; 139:3 - 140:7.
93. Homeland rejected Toby 93.  
 Tilford's letter, even though  
 they did not disagree with his  
 position that Harris was not an  
 "Insured."  
 Huver Dec., ¶16, and Ex. 1,  
 Freaner Dep, at 135:3-15;  
 135:25 - 137:14; 139:3 -  
 140:7.
94. Homeland made the decision 94.  
 to deny Plum's request for a  
 defense just 2 days after  
 Daniele Freaner was assigned  
 as the claims adjuster.  
 Freaner Dec., ¶7, 9, 11.
95. Homeland intentionally 95.  
 asserted the "Owned Auto"  
 Exclusion (B)(9) in answers to  
 interrogatories in this bad faith  
 litigation as support for their  
 decision to deny Plum a  
 defense, even though they  
 knew (B)(9) did not apply.  
 Huver Dec., ¶16 and Ex. 1,  
 Freaner Dep, at 55:17 - 56:18;  
 58:24 - 59:12; 91:10 - 92:13;  
 93:17-20; 93:21 - 94:11.

1 Huver Dec., ¶17 and Ex. 2,  
 2 Ringland Dep, at 145:13-19;  
 3 147:9-19; 152:2-5. Huver  
 Dec., ¶23 and Ex. 14, expert  
 Reilly report, pg. 204, ¶40.

4 96. Homeland recklessly 96.  
 5 disregarded the allegations in  
 6 Harris's lawsuit and  
 7 unilaterally decided the  
 disputed issue of Harris's  
 "course and scope" so they  
 could deny Plum's claim.

8 Huver Dec., ¶93 and Ex. 1,  
 9 Freaner Dep, at 115:8-14;  
 113:4-14.

10 97. Homeland was consistently 97.  
 11 and erroneously focused only  
 12 on the fact that Harris was an  
 13 "employee" when she was  
 14 injured, even though they  
 knew the correct standard  
 required Harris to be an  
 "Insured" in order for  
 Exclusion (D)(7) to apply.

15 Huver Dec., ¶16 and Ex. 1,  
 16 Freaner Dep, at 94:25 - 95:22;  
 17 113:15 - 114:7; 123:6-19;  
 18 124:9-20; 126:2-9. Huver  
 Dec., ¶17 and Ex. 2, Ringland  
 Dep, at 130:10 - 131:4; 139:6 -  
 140:4; 186:8-24. Huver Dec.,  
 19 ¶23 and Ex. 14, expert Reilly  
 report, pgs. 202-203, ¶25-33.

20 98. Homeland knew someone 98.  
 21 could be an "Employee" and  
 22 not be an "Insured" but  
 23 persisted in asserting that  
 Exclusion (D)(7) precluded  
 coverage simply because  
 Harris was an "Employee."

24 Huver Dec., ¶16 and Ex. 1,  
 25 Freaner Dep, at 113:15 -  
 114:7. Huver Dec., ¶17 and  
 26 Ex. 2, Ringland Dep, at 03:8-  
 23; 104:11-15; 105:21 - 106:4.  
 27 Huver Dec., ¶23 and Ex. 14,  
 28 expert Reilly report, pgs. 202-  
 202, ¶25-33.

1 99. Homeland recklessly and 99.  
 2 intentionally insisted that once  
 3 Harris was an "Employee," she  
 4 was also an "Insured," even  
 5 though they knew these  
 6 defined terms had different  
 7 meanings.

8 Huver Dec., ¶16 and Ex. 1,  
 9 Freaner Dep, at 95:23 - 96:5;  
 10 116:10-14; 149:23 - 150:5;  
 11 113:15 - 114:7. Huver Dec.,  
 12 ¶17 and Ex. 2, Ringland Dep,  
 13 at 94:5-18; 103:8-23; 105:21 -  
 14 106:4; 130:2-9; 180:5-11.  
 15 Huver Dec., ¶23 and Ex. 14,  
 16 expert Reilly report, pgs. 202-  
 17 203, ¶25-32.

11 100. Although Homeland claimed 100.  
 12 Harris's civil lawsuit's  
 13 allegations were "groundless,  
 14 false or fraudulent," they knew  
 15 they were still obligated to  
 16 defend Plum but intentionally  
 17 refused to do so.

18 Defs' Ex. 1, Section (I)(F), pg.  
 19 44. Huver Dec., ¶16 and Ex.  
 20 1, Freaner Dep, at 115:24 -  
 21 116:9. Huver Dec., ¶17 and  
 22 Ex. 2, Ringland Dep, at 153:25  
 23 - 154:22. Huver Dec., ¶23 and  
 24 Ex. 14, expert Reilly report,  
 25 pgs. 202-203, ¶25-31.

20 101. Homeland consciously and 101.  
 21 intentionally rejected any  
 22 notion of defending Plum  
 23 under a reservation of rights,  
 24 even though they knew if any  
 25 doubt regarding coverage  
 26 existed, doing so was the best  
 27 way to protect their insured.

28 Huver Dec., ¶16 and Ex. 1,  
 Freaner Dep, at 156:5-19.  
 Huver Dec., ¶17 and Ex. 2,  
 Ringland Dep, at 37:22 - 39:2;  
 42:18 - 43:17; 44:13-17.  
 Huver Dec., ¶23 and Ex. 14,  
 expert Reilly report, pg. 204,  
 ¶38.

1 102. Homeland has persisted in 102.  
 2 refusing to indemnify Plum  
 3 for the Harris settlement, even  
 4 though Homeland agrees the  
 5 issue of whether Harris was in  
 6 the course and scope of her job  
 7 duties has never been  
 8 conclusively established.

9 Huver Dec., ¶16 and Ex. 1,  
 10 Freaner Dep, at 63:20 - 64:16;  
 11 68:25 - 69:25; 80:20 - 81:19;  
 12 85:4-9; 96:18 - 97:13; 101:14-  
 13 25; 103:8-14; 106:10-24;  
 14 109:5-10; 127:7 - 128:2;  
 15 150:17-19. Huver Dec., ¶17  
 16 and Ex. 2, Ringland Dep,  
 17 81:5-17; 106:12 - 107:9; 109:7  
 18 - 110:1; 130:2-9; 182:7-19.  
 19 Huver Dec., ¶15 and Ex. 13.

12 103. Homeland has persisted in its 103.  
 13 bad faith refusal to indemnify  
 14 Plum by raising 2 new  
 15 exclusions 2 years after  
 16 denying Plum's claim - (D)(2)  
 17 and (D)(5) - even though they  
 18 know these exclusions do not  
 19 apply.

17 Huver Dec., ¶16 and Ex. 1,  
 18 Freaner Dep, at 137:15 -  
 19 138:11. Huver Dec., ¶17 and  
 20 Ex. 2, Ringland Dep, at 178:4-  
 21 24. Defs' Ex. 5, pgs. 147-151.  
 22 Docket Nos. 10, 32. Huver  
 23 Dec., ¶8, 10, 21.

21 104. Homeland's claims adjuster 104.  
 22 Freaner and claims manager  
 23 Ringland insist if they had the  
 24 opportunity to adjust Plum's  
 25 claim again, they would treat  
 26 Plum the exact same way and  
 27 not change one thing they did.

25 Huver Dec., ¶16 and Ex. 1,  
 26 Freaner Dep, at 122:11-21.  
 27 Huver Dec., ¶17 and Ex. 2,  
 28 Ringland Dep, at 176:5 -  
 177:4.



1 105. Homeland's conduct in denying Plum's claim for a defense was unreasonable, was in total disregard of Plum's interests, put Homeland's interests ahead of Plum's, and demonstrated a lack of proper training and/or supervision. 105.  
 2  
 3  
 4  
 5  
 6 Huver Dec., ¶23 and Ex. 14, report of expert David Reilly, ¶25-48.  
 7

8 106. Plum paid an annual premium of \$3,125,000 for The Policy. 106.  
 9  
 10 Defendants' Ex. 1, pg. 12.

11 107. Plum owes a 40% contingency attorney fee on any recovery in this case as a result of Homeland's refusal to defend and indemnify them. 107.  
 12  
 13  
 14 Huver Dec., ¶22 and Ex. 12.

15 108. Plum is entitled to interest on the \$825,000 settlement and the \$112,500 in attorneys' fees and costs incurred to defend and settle the Harris lawsuit, totaling at least \$92,968.75 as of this date. 108.  
 16  
 17  
 18  
 19

20 Respectfully submitted,  
 21 THE HUVER LAW FIRM  
 22 and  
 23 HARRIS I. STEINBERG, ESQ.

24 DATED: April 10, 2017

By: /s/ Richard Huver  
 RICHARD HUVER  
 Attorneys for Plaintiffs